

NIH POLICY MANUAL

6033-1 - CONTRACTING OFFICER'S STATEMENT OF FACTS AND CIRCUMSTANCES IN THE MATTER OF A PROTEST

Issuing Office: DAPE/OCM/OA 496-6014

Release Date: 9/10/96

1. **Explanation of Material Transmitted:** This Manual Chapter outlines a suggested format and content of a Contracting Officer's Statement of Facts and Circumstances in the Matter of a Protest, and provides a sample protest review and approval routeslip.

2. **Filing Instructions:**

Remove: Instruction and Information Memorandum DCG 85-1 (Rev. 3)

Insert: NIH Manual Chapter 6033-1/26033-1, Contracting Officer's Statement of Facts and Circumstances in the Matter of a Protest

3. **Distribution:** NIH Mailing Keys F-401, F-404, F-407

PLEASE NOTE: For information on:

- content of this chapter, contact the Division of Acquisition Policy and Evaluation, OCM, OA, on (301) 496-6014.
- NIH Manual Mailing Keys, contact the Division of Support Services, ORS, on (301) 496-4808.
- NIH Manual System, contact the Division of Management Support, OMA, on (301) 496-2832.
- on-line information, use: <http://www3.od.nih.gov/oma/manualchapters/>

A. Purpose:

This Manual Issuance suggests format and content of the "Contracting Officer's (CO's) Statement of Facts and Circumstances in the Matter of a Protest," and provides a Sample Protest Review and Approval Routeslip ([Appendix 1](#)).

B. Background:

The FAR Part 33 and HHSAR Part 333 prescribe overall procedures for the handling of protests. Specifically, FAR Subpart 33.104(a)(2) and Subpart HHSAR 333.104(a)(2)(i) set forth the requirements for preparation of the "CO's Statement of Facts and Circumstances" when a protest, before or after award, has been lodged with the General Accounting Office (GAO).

C. References:

1. FAR 33.104 - Protests to GAO
2. HHSAR 33.104 - Protests to GAO
3. NIH Policy Manual [6033-2/26033-2](#), Stay Provisions for Protest Filed Directly with GAO (pending release)

D. Procedures:

To assist COs in the complete and expeditious preparation of the "CO's Statement of Facts and Circumstances in the Matter of a Protest," a recommended format, indicating the information to be supplied, is provided in [Appendix 2](#). The CO shall prepare protest files in accordance with guidance provided in HHSAR 33.104. Each file should contain a Table of Contents, listing the enclosed documentation. Documentation considered proprietary, confidential, or source-selection sensitive, as well as other information whose release could result in a competitive advantage to one or more firms, shall be identified as protected information. The GAO may issue a protective order controlling the treatment of the protected information.

The submission of protest files has been streamlined as follows:

1. Two sets of the complete protest files are to be sent directly to the Department's Protest Control Officer (DPCO). The DPCO will coordinate file dissemination to the GAO. The protest files are to be addressed to:

Michael Colvin
Department Protest Control Officer
HHH - 517D
200 Independence Avenue, SW
Washington, DC 20201
Phone: 202-690-7887 or 202-690-6901

They shall be marked "Immediate Action - GAO Protest B- (insert applicable case number)."

2. One set of the protest file is to be submitted to the NIH Protest Control Officer (PCO) who coordinates dissemination to the OGC. If the CO's Statement of Facts and Circumstances is not part of the protest file submission, four sets (one original and three copies) of the signed document shall be submitted to the NIH PCO.

Protest files are due to the DPCO and NIH PCO 16 calendar days from the filing date of the protest with the GAO. The CO's Statement of Facts and Circumstances is due 22 calendar days from the date of filing. The DPCO will submit this material, plus the Agency's protest report, to the GAO within the prescribed 30 calendar day period.

Appendix 1. Protest Review and Approval Route Slip:

CONTRACTING OFFICER
(IDENTIFY ORGANIZATIONAL AFFILIATION)

DATE

ADDRESS/PHONE

CONTRACTING OFFICER
(IDENTIFY ORGANIZATIONAL AFFILIATION)

DATE

ADDRESS/PHONE

CONTRACTING OFFICER
(IDENTIFY ORGANIZATIONAL AFFILIATION)

DATE

ADDRESS/PHONE

ZAIGA E. TUMS
NIH PCO, DAPE, OCM

DATE

6100/6C01 496-6014

ADDRESS/PHONE

MICHAEL G. COLVIN
DHHS PCO

DATE

HHH/517D 202-690-7887

ADDRESS/PHONE

Appendix 2. * Contracting Officer's Statement of Facts and Circumstances in the Matter of a Protest:

BEFORE/AFTER AWARD TO

BY _____

GAO CASE #B _____

1. Background

State briefly the overall purpose of the acquisition and provide a brief history of any technical/administrative aspect necessary to understand the protest.

2. Chronology of Events

List the events in chronological order leading up to and including the protest. This

section may include as applicable: RFC receipt date; date of Commerce Business Daily announcement; RFP/IFB release date; proposal/bid due date; number of proposals/bids received; bid submission and bid opening information; competitive range determination; source selection determination; anticipated award date; dates of debriefings and the date the protest was received. Explain at which point in the acquisition cycle the protest was received. Discuss any aspects of these events, such as bid responsiveness or responsibility issues, competitive range issues or negotiation issues, that are key to understanding the protest.

3. Statement of Issues, Findings and Circumstances

Discuss individually the allegations made by the protestor and respond individually to each allegation. Separate the allegations into technical and business/administrative allegations if appropriate. Include a discussion of the merits of each allegation and provide any additional evidence or information deemed necessary in determining the validity of the protest.

4. Summary of Recommendations and Conclusions

Summarize your recommendations and conclusions on the merits of the protest. Do not repeat each individual allegation listed in Section 3 above.

*This suggested format is intended to meet the requirements set forth in FAR 33.104(a)(3)(ii) and HHSAR 33.104(a)(3).

5. Documents to be Withheld from Protestor

The Contracting Officer shall clearly identify any document or portions of documents he or she wishes to withhold from the protestor as protected information. In general, GAO will issue a protective order controlling the treatment of protected information. If no protective order has been issued, then generally any information, which can be withheld under the Freedom of Information Act (FOIA) can generally be withheld from the protestor and interested parties during the protest. Any FOIA requests regarding a pending GAO protest shall be forwarded for action to the DPCO.

6. Recommendation to Proceed with Award or Continue with Performance (Optional)

- a. In a protest to the GAO, an award may not be made until the protest is resolved unless the Contracting Officer obtains concurrence by the Principal Official Responsible for Acquisition (PORA) and approval by the Deputy Assistant Secretary for Grants and Acquisition Management, OS, DHHS. Within the NIH, the PORA is the Director, Office of Contracts Management, OA.
- b. If the Contracting Agency receives notice of a protest from the GAO within 10 calendar days of the date of contract award, the Contracting Officer must suspend performance or terminate the award unless continuation of contract performance is authorized by the officials identified above. See FAR 33.104(c)(2) for criteria necessary to continue contract performance.

- c. Guidance concerning the necessary determinations and documentations for proceeding with award or continuance of performance while a protest is pending at GAO is found in the NIH Manual Issuance 6033-2/26033-2 (pending release).
- d. In the case of a protest to the agency, the Contracting Officer is authorized to make the determination using the criteria in FAR 33.104(a), to award a contract notwithstanding the protest after obtaining the concurrence of the NIH Protest Control Officer and the Business and Administrative Law Division, Office of General Counsel, OS. To recommend proceeding with award, the Contracting Officer must provide rationale and supporting details on one or more of the criteria listed in FAR 33.104 (i.e., the supplies or services to be contracted for are urgently required; delivery or performance will be unduly delayed by failure to make award promptly; prompt award will be otherwise advantageous to the Government).

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